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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1543

STEVEN L. AMDUR,

Petitioner,

vs.

THE CITY OF CHICAGO, a municipal corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals properly limited its decision to the question of whether the rezoning ordinances constituted a "taking" under *Agins v. City of Tiburon*, 447 U.S. 255 (1980), due to failure of petitioner to seek a building permit before filing this lawsuit.

2. Whether the Court of Appeals properly exercised its discretion in denying petitioner leave to amend his complaint where petitioner chose not to amend after dismissal by the District Court, petitioner chose instead to stand on his pleading and appeal to the Court of Appeals and, only after an adverse ruling by the Court of Appeals, did he seek leave to amend in a petition for rehearing.

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DECISIONS BELOW

The decision of the Court of Appeals in this case is reported as *Amdur v. City of Chicago*, 638 F.2d 37 (7th Cir. 1980).

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

Petitioner, for a number of years, has owned and operated a five-story, 32-unit apartment building on the near north side of Chicago. Petitioner's property is located in a residential neighborhood. Petitioner alleges that the area in the vicinity of his property is characterized by the presence of high density residential structures.

From 1957 to September 12, 1979, petitioner's property as well as most of the other property in the area, was zoned under the R7 General Residential District zoning classification. The remaining property in the area was predominantly zoned under the R6 zoning classification.

In 1979, the City Council of the City of Chicago enacted a series of ordinances rezoning to the R5 zoning classification a number of parcels of land in the area, including petitioner's property. Land improved with high-rise structures was not rezoned since to do so would only create non-conforming uses. The net effect of the rezoning ordinances was to reduce the permitted density of the affected properties to the approximate level of their present use.

Petitioner does not contend that he is precluded from using his property in the manner in which it was used immediately prior to enactment of the ordinances. Instead, he alleges that the R5 rezoning diminished property values in the affected area and that, in particular, the value of his investment declined $400,000. He also alleges:

> "Under the R5 zoning Plaintiff will not be able to realize a reasonable return on his investment in that Plaintiff cannot economically remove the building thereon and replace it with an improvement permissable under R5 zoning."

(Complaint, par. 12). Petitioner admits he did not apply for a building permit before filing suit.

Petitioner concludes that the rezoning ordinances are unreasonable, arbitrary and capricious, that they take his property without just compensation, that they deny his right to equal protection under the law, and that they violate the Fair Housing Act. He seeks damages, a declaration that the rezoning ordinances are unconstitutional and therefore invalid, plus other unspecified relief.

B. PROCEDURAL HISTORY

Following commencement of the action on January 16, 1980, respondent moved to dismiss the complaint and filed a supporting brief arguing, *inter alia*, the following points: (1) Counts I through IV (the Constitutional allegations) fail to state a claim upon which relief may be granted, (2) Count V (the Fair Housing Act claim) contains only conclusory allegations upon information and belief and therefore should be stricken, (3) plaintiff does not have standing to litigate the Fair Housing Act claim because he does not allege that he is a member of

the racial class affected by the alleged violation, and (4) plaintiff's claims are nonjusticiable because he does not allege that he was denied a building permit for alternative use of his property. Petitioner filed a lengthy brief opposing the motion.

On April 18, 1980, the District Court granted the motion, dismissed the case, and held that the constitutional claims were "immaterial" and made solely for the purpose of obtaining federal jurisdiction. Implicit was a finding that the complaint failed to state a claim upon which relief could be granted.

Petitioner declined to file an amended complaint. He chose to stand on his pleading and appeal to the Court of Appeals. In the meantime, this Court decided *Agins v. City of Tiburon*. The Court of Appeals affirmed the District Court on the basis of *Agins*.

Thereupon, petitioner filed a petition for rehearing seeking, for the first time, leave to amend his complaint. The Court of Appeals having already decided the issues raised by petitioner, and petitioner having waived the opportunity to amend his complaint in the District Court, the petition for rehearing was denied on January 8, 1981.

SUMMARY OF ARGUMENT

1. The petition should be denied because it presents no question worthy of review by this Court. First, this Court recently decided the key substantive issue raised in the petition (*i.e.*, whether the rezoning ordinances constitute a "taking" requiring just compensation) in favor of the respondent city in *Agins v. City of Tiburon*. The decision below followed *Agins*. Second, petitioner does not present a "case or controversy" because he failed to seek a building permit before filing this lawsuit.

2. The Court of Appeals did not abuse its discretion in denying petitioner leave to amend his complaint, because he waived his right to do so in the District Court; he chose instead to stand on his pleading and appeal; and he did not seek leave to amend until his petition for rehearing, after he had lost not once but twice on the merits of his complaint. Second, leave to amend need not be granted where, as here, the plaintiff is not entitled to any relief under any facts which could be proved in support of his claim. Finally, petitioner's desire to amend his complaint by adding analogies to air rights condemnation is frivolous, at best.

REASONS FOR DENYING THE WRIT

The decision of the court of appeals in this case is clearly correct. Moreover, the case raises no novel question of federal law, nor is there any conflict between circuit courts of appeals.

I.

THE COURT OF APPEALS PROPERLY LIMITED ITS DECISION TO THE QUESTION OF WHETHER THE REZONING ORDINANCES CONSTITUTED A "TAKING" UNDER *AGINS v. CITY OF TIBURON*, 447 U.S. 255 (1980), DUE TO FAILURE OF PETITIONER TO SEEK A BUILDING PERMIT BEFORE FILING THIS LAWSUIT.

The court below, relying upon this court's decision in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), held that plaintiff's complaint failed to state a cause of action. As observed by the Court of Appeals, the issues and factual circumstances presented to this court in *Agins* are virtually indistinguishable from the case at bar.

The crux of petitioner's claim is that (a) the Chicago near north zoning ordinances cause a diminution in value of his property and constituted a "taking" for which he is entitled to just compensation, and (b) such ordinances unreasonably discriminate against him because existing high-rises were not similarly down-zoned, in violation of the Fifth and Fourteenth Amendments. The District Court dismissed the complaint because "the constitutional claims alleged therein are immaterial" (i.e., without merit) and made solely for the purpose of obtaining federal jurisdiction. The Court of Appeals affirmed on the ground that the complaint failed to state a claim upon which relief may be granted, citing *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

In *Agins*, this Court upheld the constitutionality of a rezoning ordinance under facts nearly identical to the instant case. The plaintiff purchased prime real estate before it was rezoned; he planned to develop it with residential structures; before he could do so, the City rezoned the property such that the permitted number of homes and population density thereon was less than he anticipated; nevertheless, the current use of the property was unimpaired and plaintiffs could still develop the property for residential purposes; plaintiff failed to seek, much less exhaust, his administrative remedies by seeking a building permit; and the complaint was dismissed for failure to state a claim.

This Court decided that the *Agins* complaint could only attack the Tiburon ordinance as facially invalid. No concrete controversy was presented concerning the constitutionality of the zoning ordinance as applied because plaintiff had failed to submit to the responsible governmental authorities a plan for development of his property. Thus, the issue before this Court was "whether the mere enactment of the zoning ordinance constitutes a taking." 447 U.S. at 260. In answering this question in the negative a two-step constitutional test was enunciated and utilized by this court:

> "The application of a general zoning law to a particular property effects a taking if the ordinance does not substantially advance legitimate state interests [Citation] or denies an owner economically viable use of his land [Citation]." [447 U.S. at 260]

As to the first element, this Court, referring to its decision in *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974), held that a legitimate governmental goal to be advanced by a rezoning ordinance is protection of City residents from such "ill-effects of urbanization as air and noise pollution, traffic congestion, destruction of

scenic beauty, and other demonstrated consequences of urbanization." 447 U.S. at 261, fn. 8.[1] As to the second element, this Court held that the mere reduction in value of plaintiff's land did not constitute a taking:

> "Although the ordinances limit development they neither prevent the best use of appellant's land

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[1] Many other decisions hold that mere diminution in value as the result of legislative enactment does not constitute a "taking." *Andrus v. Allard*, 444 U.S. 51, 66, 62 L.Ed. 2d 210, 100 S.Ct. 318 (1979) (prohibition against selling eagle feathers, which greatly reduced their value as well as owner's future profits, does not constitute a taking); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 130, 57 L.Ed. 2d 631, 98 S.Ct. 2646 (1978), *reh. denied* 439 U.S. 883, 58 L.Ed. 2d 198, 99 S.Ct. 226 (1978) ("[T]he submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore have believed was available for development is quite simply untenable."); *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, n.8, 49 L.Ed. 2d 132, 96 S.Ct. 2358 (1976) (zoning referendum against high rises upheld); *Goldblatt v. Hempstead*, 369 U.S. 590, 592, 8 L.Ed. 2d 130, 82 S.Ct. 987 (1962) (zoning ordinance preventing beneficial use of property as a quarry, to which it previously had been devoted, upheld); *Hadacheck v. Los Angeles*, 239 U.S. 394, 60 L.Ed. 2d 348, 36 S.Ct. 143 (1915) (rezoning ordinance prohibiting operation of brickyard, which caused the value of owner's investment to drop from $800,000 to $60,000, upheld); *William C. Haas v. City & Cty. of San Francisco*, 605 F.2d 1117 (9th Cir. 1979), *cert. denied* 445 U.S. 922, *reh. denied* 446 U.S. 929 (1980) (rezoning ordinance, which adopted 40-foot height limitation, reduced population density from R5 to R3, thereby prevented owner's high-rise development after construction had begun, and caused the value of his property to diminish from $2,000,000 to $100,000, upheld). *See also Steel Hill Development, Inc. v. Town of Sanbornton*, 469 F.2d 956, 963 (1st Cir. 1972); *Oceanic California, Inc. v. City of San Jose*, 497 F.Supp. 962, 973-977, n.18 (N.D. Calif. 1980) ("economically viable" language in *Agins* does not intimate that the Taking Clause guarantees landowners an economic profit from use of their land; and allegation that each of the uses permitted under the plan would cost more to implement and maintain than the gross income therefrom would yield, is insufficient); 8 E. McQuillian, *Municipal Corporations* §25.44, p. 101 (3d ed., 1976).

> [citation] nor extinguish a fundamental attribute of ownership [citation]." [447 U.S. at 262]

The result below is entirely consistent with the decision of this Court in *Agins*. The rezoning ordinances imposed more stringent density restrictions than had been provided for in zoning ordinances passed in 1957. The purpose of the ordinances is to limit the growth rate of population density within manageable limits for city streets, services and facilities.

In *Berman v. Parker*, 348 U.S. 26 (1954), this Court defined the term "public welfare":

> "The concept of public welfare is broad and inclusive, [citation]. The values it represents are spiritual as well as physical, aesthetic as well, as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled."

There can be no doubt that the rezoning ordinances substantially advance legitimate public purposes. Given the strong presumption that such exercises of the police power are constitutional, e.g., *Goldblatt v. Hempstead*, 369 U.S. 590, 594, 596 (1962) ("debatable questions as to reasonableness are not for the courts but for the legislature"), the decision of the Court of Appeals was entirely correct and need not be reviewed.

As to the second element in *Agins*, the instant rezoning ordinances do not deny petitioner the economically viable use of his property. He has owned and operated it as a rental building for numerous years, apparently satisfied with the income generated by the 32 apartments. That the investment value of the property may have been adversely affected certainly does not constitute a taking. In *Agins*, the landowner's investment in a

five-acre tract was similarly affected but not destroyed, when a rezoning ordinance reduced the maximum permissible development to five single family homes.

Moreover, the fact that a land use law injures some landowners more than others does not in itself constitute a taking. *Penn Central Transp. Co. v. New York City, supra,* 438 U.S. at 135-136.

Actually, the complaint in this case is most striking for what it *fails* to allege. Petitioner does not contend he is prevented from possessing, renting, modifying or selling the property; he does not, and cannot, complain that his property has been taken over or appropriated by the City. Rather, he simply contends that he could not generate as great a profit from tearing down the old and building a new structure. Such allegations are clearly insufficient under *Andrus v. Allard,* 444 U.S. 51, 65-66 (1979).

Petitioner admits that he currently operates a five-story, 32-unit rental apartment building on the site (Complaint, par. 4). On their face, the rezoning ordinances do not prohibit construction of a new rental or condominium apartment building on petitioner's property. As held by the Court of Appeals:

> ". . . Amdur may still build on his property. He simply may not construct as large a high-rise as he had planned."

638 F.2d at 38.

As to petitioner's argument that the ordinances denied his right to equal protection, suffice it to say that the only basis for such claim is that existing high-rises were not rezoned. The only effect of rezoning the high-rises, however, would have been to create nonconforming uses which would not advance the legitimate purposes of the

ordinances. If anything, the omission of existing high-rises from the ordinances demonstrates the good sense and purpose of the legislation. As enacted, the ordinances do not prevent anyone from continuing the current use of his or her property. The Court of Appeals correctly decided the equal protection issue.

The petitioner concludes that the Court of Appeals misapplied in the case at bar the reasoning and rule enunciated in *Agins* (Petitioner's Brief, p. 10). Specifically, petitioner contends that the Court of Appeals interpreted the *Agins* decision to require, as a precondition to challenging the constitutionality of a zoning ordinance, an application for a building permit. However, the court below addressed the constitutional issue presented by petitioner's complaint. Because petitioner failed to apply for a building permit, the court below, as did this Court in *Agins*, limited its inquiry to the facial validity of the challenged ordinance. The many references in the petition which are *dehors* the record would perhaps be relevant to an inquiry as to the constitutionality of a zoning ordinance as applied. Yet petitioner disavows any intention of attacking the zoning ordinances as applied. Petitioner cites the Illinois Supreme Court decision in *LaSalle National Bank v. County of Cook*, 12 Ill. 2d 40 (Ill. S. Ct. 1957), and argues that the criteria for determining the constitutional validity of a zoning ordinance set forth therein demonstrates that the zoning ordinances presently under attack are arguably invalid. In *LaSalle National Bank* the court reviewed a holding of the Circuit Court of Cook County that a zoning ordinance was unconstitutional and invalid as applied. The criteria established in *LaSalle National Bank* are only relevant to an inquiry as to the constitutionality of a zoning ordinance *as applied*. In this case petitioner has failed to point to any language in the

zoning ordinances that arguably violates his constitutional rights.

Accordingly, this case is not concrete and fails to present a "case or controversy." It is undisputed that petitioner sought neither a building permit nor a zoning variance before filing this lawsuit. Therefore, he does not present a justiciable issue for prospective relief by the federal court. *See Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, n. 13, 49 L.Ed. 2d 132, 96 S.Ct. 2358 (1976); *Warth v. Seldin*, 422 U.S. 490, 504, 516-517, 45 L.Ed. 2d 343, 95 S.Ct. 2197 (1975).

Because there is no issue justifying the exercise of certiorari jurisdiction, the petition should be denied.

II.

THE COURT OF APPEALS DID NOT ABUSE ITS DISCRETION IN DENYING LEAVE TO AMEND THE COMPLAINT.

Petitioner implicitly concedes that the Court of Appeals may have correctly decided the case, by contending that the Court abused its discretion by denying him leave to amend. Such argument not only misconstrues the rulings below, it fails under petitioner's cited authorities.

The District Court dismissed the complaint because the constitutional claims were immaterial and were asserted only for the purpose of obtaining federal jurisdiction. Implicit was a finding that the complaint failed to state a claim upon which relief could be granted. That was the major issue briefed and argued in the trial court. The crucial fact is that petitioner waived his right to amend the complaint and, instead, appealed. The Court of Appeals carefully considered the parties' briefs and oral argument, followed *Agins v. City of Tiburon*, and affirmed the District Court's ruling as

to the insufficiency of the complaint. Thus, it was only after petitioner had lost *twice* that he sought leave to appeal. He did so in a petition for rehearing.

It is firmly estabished that, where the plaintiff stands upon his pleading rather than amending it, and appeals from a judgment of dismissal, he will not normally be permitted to amend either in the appellate court or in the trial court if the order of dismissal is affirmed. *See 222 East Chestnut St. Corp. v. Lakefront Realty Corp.*, 256 F.2d 513, 515 (7th Cir. 1958), *cert. denied* 358 U.S. 907 (1958). *See generally* 3 Moore, *Federal Practice* ¶15.11, p. 15-147 (2d ed. 1980). For this reason alone, the Court of Appeals quite properly denied the request for leave to amend.

It is equally established that leave to amend need not be granted even when timely requested, where "it appears to a certainty that plaintiff would not be entitled to any relief under any state of facts which could be proved in support of his claim." *Stern v. United States Gypsum*, 547 F.2d 1329, 1334 (7th Cir. 1977). *See also Halpert v. Wertheim & Co.*, 81 F.R.D. 734 (S.D.N.Y. 1979). This result was sanctioned in *Foman v. Davis*, 371 U.S. 178 (1962), where this Court noted that leave to amend should be granted, "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject for relief . . ." 371 U.S. at 182 (emphasis supplied). Applying these principles to the case at bar, it is clear that the underlying facts are not a proper subject for relief, and that amendment would be futile.

The district and appellate courts carefully considered petitioner's claim and found it totally defective. The complaint was properly dismissed under *Agins v. City of Tiburon.* Petitioner now contends that, "any defect in his complaint, which may have caused the Court of Appeals

to perceive a factual similarity between his complaint and *Agins*, can be cured by more specific pleadings. Petitioner further believes "that any perceived defect in the allegations of *per se* impermissibility of the ordinances can, if this Court rules on the question discussed in Section C, *supra*, be cured by specific allegations as to the similarity between the ordinances and air rights condemnation." (Petition for Certiorari at 27-28).

It is thus apparent that any amendment to the complaint would neither add any new legal theory under which plaintiff could proceed, nor change any facts upon which the complaint is based. The Court of Appeals was adequately apprised of the relevant facts, and the contention that the addition of analogies to the complaint would somehow cure its legal insufficiency is frivolous. Where the amendment adds nothing to the complaint, denial of leave to amend is not an abuse of discretion. *Bouse v. Bussey*, 573 F.2d 548, 551 (9th Cir. 1977).

CONCLUSION

Respondent requests this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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